

HUMAN SERVICES BOARD

INTRODUCTION

DISCUSSION

This case concerns the "substantiation" by DAD of a report that in November 2001 the petitioner struck and bruised "J.R.", a mentally disabled adult for whom the petitioner had provided care in her home for the previous ten years. J.R. is a woman in her twenties who is severely developmentally disabled. She has the mental capacity of a four year old and very limited speech. The un rebutted testimony from one of her case managers is that she is incapable of understanding a legal oath.

A hearing in this matter was held on June 5, 2002. Several witnesses for the Department offered hearsay testimony that J.R. told them that bruises that had been observed on her arm were caused by the petitioner hitting her. There were no recordings of any conversations or interviews with J.R. The Department also offered testimony that J.R.'s behavior had deteriorated the year previous to the allegations that are the subject of these proceedings. There was also un rebutted testimony that J.R. frequently bruised herself as a result of accidents and mishaps. There was no allegation of any other incident of abuse or mistreatment by the petitioner. All the Department's witnesses (including J.R.'s mother) conceded that the petitioner had provided good care for J.R. for the ten years that preceded this incident.

The Department concedes at the outset that it may not rely solely on "hearsay" evidence to prove the allegations in a disabled adult abuse record unless the alleged victim is made "available to testify" pursuant to Rule 804a of the Vermont Rules of Evidence. Otherwise, the statements are excluded as hearsay under V.R.E. 804.

At the hearing on June 5, 2002, the Department did attempt to offer the "testimony" of J.R. By agreement of counsel J.R. was examined with only the parties' attorneys

present in a room equipped with a one-way mirror from behind which the hearing officer and the parties could observe. Due to an omission by the attorneys, this examination was not recorded. The Department's attorney administered an "oath", but there was no indication that J.R. understood it. J.R. then became upset and withdrawn almost immediately. The hearing officer observed that J.R., with some prompting, appeared to state that the petitioner "punched me". However, this was virtually the only responsive or intelligible statement she was able to make during the entire examination. The examination ended after about ten minutes when J.R. became upset and totally unresponsive.

No further evidence was taken (the petitioner did not put on her case) after the hearing officer advised the parties that he would rule that J.R. had not been "available to testify" within the meaning of the rules of evidence (see infra). The Department agreed to continue the matter to reconsider its position in light of the hearing officer's ruling. The parties subsequently advised the hearing officer that he should proceed with this recommendation.

The Human Services Board has exhaustively examined the scope of hearsay evidence admissible in abuse proceedings.

Fair Hearing No. 16,391. Much of the discussion below is taken verbatim from that case.

The Board is required by its own administrative rules to follow the "rules of evidence applied in civil cases by the courts of the State of Vermont". Fair Hearing Rule 12. Those rules generally forbid the use of "hearsay" testimony to try to prove an allegation. "Hearsay" is defined in the Vermont Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted". V.R.E. 801. In the context of abuse and neglect hearings, "hearsay" evidence most often takes the form of taped statements of alleged victims and the testimony and notes of therapists and investigators offered to prove the fact of the alleged abuse. Such evidence would be considered inadmissible hearsay under state evidentiary rules unless it was admissible under some exception to the hearsay rule.

Because DAD has an obligation to protect elderly and disabled adults, and because such adults are frequently newly traumatized by repeating their allegations in a formal setting, the agency can be confronted with a dilemma when it tries to prove the facts it relied upon in entering findings that would lead it to place a perpetrator's name in its

registry. It is often the case that there are no witnesses to the abuse, no or inconclusive physical evidence of the abuse, and no admissions of the abuse by the alleged perpetrator. The crucial, and in many cases the only, evidence is the statement of the victim; and under the formal rules of evidence, the only way those statements can be taken into evidence (unless they are subject to an enumerated exception) is through the direct testimony of the alleged victim.

For many years the Board responded to this dilemma by invoking a special exception to the "hearsay rule" found in its own administrative rules. The so-called "relaxed hearsay rule" allows substitutions for the direct testimony of the alleged victim when the hearing officer determines that following the formal rules would create an "unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs". Fair Hearing Rule 12. Under this relaxed rule, which was applied for over a decade, the Board typically found that it was a hardship for the Department to produce the alleged victim and admitted some other evidence in lieu of the alleged victim's testimony--most commonly tape-recorded statements, and therapist and investigator notes and testimony. To be sure, this hearsay testimony was subjected

to rigorous scrutiny for trustworthiness and was often ultimately rejected by the hearing officer. However, the Board considered this a fair relaxation of the rule not only because of this strict scrutiny of the hearsay but also because the Department's burden of proof was not high ("a preponderance of the evidence") and, most importantly, because the loss of property or liberty to the petitioner by being listed in the registry was minimal.¹

About eight years ago, a challenge was made to this process through an appeal to the Supreme Court by a petitioner who was found to have sexually abused two children based only on hearsay evidence. Fair Hearing No. 11,766. In its decision the Supreme Court affirmed that the Board could correctly support a decision that sexual abuse occurred solely through the use of hearsay evidence. In re Selivonik 164 Vt. 383, 390 (1995).

For a few years thereafter the Board continued to use this standard, believing that the Vermont Supreme Court had approved it. However, in 1996, the Board, in a rare rejection of the hearing officer's finding that the hearsay evidence

¹ Under the Vermont statutes, the registry finding can only be disclosed to specific designees, and specifically cannot be disclosed for "employment purposes, for credit purposes or to a law enforcement agency other than the state's attorney." 33 V.S.A. § 6911(c).

offered in the case was unreliable, made a finding of sexual abuse against a father of his child based solely upon hearsay evidence. That decision was appealed to the Supreme Court. See Fair Hearing No. 13,720. The Supreme Court reinstated the hearing officer's finding that the hearsay testimony had been unreliable on the issue of whether the child had been telling the truth and reversed the Board's denial of the expungement. In re C.M. 168 Vt. 389 (1998). However, the Court went further to decide an important issue raised by the appellant, which was the use of the "relaxed hearsay" rule in proceedings involving sexual abuse allegations. The appellant in that case argued that the Board should be subject to the restrictions in Rule 804a, an evidentiary exception in the Vermont Rules of Evidence, even though the Board was not specifically enumerated as an administrative agency covered by the rule. The Department (in that case, SRS) argued that the Board should be allowed to continue to use its Rule 12 in these cases. However, the Court agreed with the petitioner that the legislature intended to include all administrative agencies in V.R.E. 804a. It "found no reason to exclude expungement proceedings from this general rule" and concluded that V.R.E. 804a applied in determining the admissibility of hearsay statements concerning abuse in an expungement hearing.

V.R.E. 804a is quite different from Fair Hearing Rule 12 in that it requires that the child or mentally impaired adult be made available at the hearing before the hearsay statements are allowed in:

RULE 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE TEN OR UNDER; MENTALLY RETARDED OR MENTALLY ILL ADULT

(a) Statements by a person who is a child ten years of age or under or a mentally retarded or mentally ill adult as defined in 14 V.S.A. Sec. 3061 at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal or administrative proceeding in which the child or mentally retarded or mentally ill adult is a putative victim of sexual assault . . .²

(2) the statements were not taken in preparation for a legal proceeding . . .

(3) the child or mentally retarded or mentally ill adult is available to testify in court or under Rule 807³

(4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

Since the Supreme Court's ruling in C.M., the Board has applied this Vermont Rule of Evidence in all child and elderly abuse cases, ruling that the Department of SRS or DAD cannot

² There follows a long list of enumerated proceedings to which this section applies. As the Supreme Court has already determined that this section applies to expungement proceedings before the Board, it is not necessary to list them.

³ Rule 807 allows recorded under-oath testimony and testimony via two-way closed circuit television (see infra).

present hearsay evidence without making the child or mentally disabled adult available to testify. See Fair Hearings Nos. 16,391, 16,479 and 16,838. The Board has specifically ruled in these cases that as the proponent of the hearsay statements it is the obligation of the Departments to procure the attendance of the child or mentally disabled adult witness at the hearing for purposes of cross-examination. If it chooses not to do so, all of the hearsay evidence--therapist and investigator notes, testimony and other recorded statements made by the alleged victim outside of the hearing--is disallowed to prove the truth of the allegations.

This particular case is one of first impression before the Board as to the applicability of this rule when the alleged victim of abuse appears at a hearing, but is unable to offer comprehensible or meaningful testimony as a result of a mental disability. If the Board were operating under the "relaxed hearsay" rule (Fair Hearing Rule 12) the hearing officer would be empowered to find an unnecessary hardship on this basis, admit the hearsay testimony and carefully scrutinize it for reliability.

However, as noted in its more-recent cases, Rule 804a reflects a "strong legislative intention to safeguard the right of confrontation [found in the Sixth Amendment to the

United States Constitution] while at the same time curing the frequent problem of lack of corroboration caused by the traditional hearsay rules". V.R.E. 804a, Reporter's Notes.⁴ Thus, it must again be concluded that allegations of abuse made by disabled adults are subject to proof through the evidentiary rules and exceptions followed in the civil courts of this state, and not to Fair Hearing Rule 12.

This leaves the Department in this matter with no admissible evidence upon which it can be found that the petitioner ever hit and/or bruised J.R. V.R.E. 804(a)(4) defines "unavailability" as "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity". As noted above, other than stating that the petitioner "hit me", J.R. could

⁴ The Sixth Amendment does not actually apply to hearings before the Human Services Board since they are not criminal prosecutions. However, since non-criminal proceedings were also included in Rule 804a the legislature must have felt that there is some right to confrontation of witnesses even in a civil case, presumably pursuant to the Fourteenth Amendment due process clause in the United States Constitution.

not meaningfully or intelligibly answer any other question put to her by the parties' attorneys.⁵ Thus, it cannot be concluded that J.R. was "available to testify" as required by V.R.E. 804a(a)(3).⁶

Moreover, as noted above, the Department did not record any of the interviews with J.R. that form the entire basis of its proffered hearsay testimony in this matter. The Board has often held that a lack of a contemporaneous record severely undermines the credibility and reliability of any hearsay testimony considered in these proceedings. (See e.g., Fair Hearing No. 16,424.) In this case, given J.R.'s limited ability to verbalize, this omission is particularly critical.⁷ Therefore, it cannot be concluded that such testimony, even if deemed to be otherwise admissible, has a "substantial indicia of trustworthiness" required under V.R.E. 804a(a)(4).

⁵ Although it need not be ruled upon, this raises the possibility, if not the likelihood, that this aspect of J.R.'s "testimony", even if somehow admissible, was well rehearsed and, therefore, less than fully credible.

⁶ Although the Board need not reach this issue, given J.R.'s extremely limited ability to verbalize and the unrebutted testimony and observations of the hearing officer that J.R. does not understand an oath to tell the truth, it would have to be concluded that she was not "competent" to offer testimony within the meaning of V.R.E. 601(b). Therefore, even if it can be concluded that J.R. was "available to testify", any testimony she can be deemed to have given in this matter would have to be stricken.

⁷ One of J.R.'s case managers testified that she helped "interpret" some of J.R.'s answers during the interview with the DAD investigator.

ORDER

The Department's decision in this matter "substantiating" the report of abuse by the petitioner is reversed.

#